United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

34/2

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,513

DAVID E. BOSLEY,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a Judgment of the United States
District Court for the District of Columbia

MURDAUGH STUART MADDEN
R. TIMOTHY HANLON
910 17th Street, N.W.
Washington, D.C.

Counsel for Appellant
(Both Appointed by this Court)

May 8, 1969

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. CASES

B. STATUTES AND RULES

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
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Appellant

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UNITED STATES OF AMERICA,
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia of the crimes of housebreaking (22 D.C. Code § 1801), assault with intent to commit rape (22 D.C. Code § ~~2801~~ 501), and sodomy (22 D.C. Code § 3502).

Appellant was found guilty of these crimes by a jury verdict rendered September 27, 1967. On November 3, 1967, appellant was sentenced to serve four (4) to twelve (12) years on the housebreaking count, four (4) to twelve (12) years for assault with intent to commit rape under a count charging rape, and three (3) to nine (9) years on the sodomy count, with the sentences on the sodomy count and one of the first two counts to run concurrently but consecutively to the sentence on the other of the first two counts.*

Leave was granted appellant on November 20, 1967, to appeal in forma pauperis. Appellant is now confined at the Lorton Reformatory.

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* Count 1 charged housebreaking, Count 2 charged rape, and Count 3 charged sodomy (Tr. 259-266). The judgment indicates that the sentences on Count 2 and Count 3 are to run concurrently with each other and consecutively to the sentence imposed on Count 1. However, the Trial Court apparently thought at sentencing that it was Count 1 which charged rape and Count 2 which charged housebreaking: "It is the judgment of this Court that the defendant be convicted on Count One, the offense of assault with intent to rape, Count Two, the offense of housebreaking, and Count Three, the offense of sodomy..." (Tr. of Sentencing proceedings 3). It is not clear, therefore, which of the sentences on the first two counts the Court intended to run concurrently with the sentence on Count 3.

The jurisdiction of this Court on appeal is based on 28 U.S. Code § 1291.

QUESTIONS PRESENTED

1. Did the Trial Court err in allowing a police officer to testify, over appellant's objection, to a statement allegedly made to the officer by appellant while in police custody?

2. Did the Trial Court err in admitting testimony concerning the statement allegedly made by appellant to the officer and concerning laboratory examinations on clothing and hairs taken from appellant, in that the statement and the items taken from appellant were all fruits of an illegal arrest?

3. Did unsupported questions posed to appellant by Government counsel concerning the presence of "obscene books" and "pornographic literature" in his apartment deprive appellant of a fair trial?

[This case has not been previously before this Court except on appellant's motion for release on personal recognizance during the daytime, decided, under the same name and number, by orders filed August 9, 1968 and October 7, 1968.]

STATEMENT OF THE CASE

At approximately 9 a.m. on March 18, 1966, as Appellant David E. Bosley lay sleeping on a living room couch in the apartment in which he was then living, Detectives William J. Boyle and Charles L. Harrell of the District of Columbia Metropolitan Police Department pushed open the door of the apartment and entered, shook Mr. Bosley awake, and placed him under arrest (Tr. 49-51, 58, 66, 176-177, 208-209). Detective Boyle then told Mr. Bosley that the occupant of the apartment below his in the same building, Miss Georgene G. Nolte, had complained that he had broken into her apartment earlier that morning and raped her (Tr. 185).

Mr. Bosley gave an answer to Detective Boyle, the content of which was controverted at trial, and then was taken to the Police Station. There he was required to strip to his skin in front of detectives, who took from him all of his clothing and some pubic hairs (Tr. 59, 61, 185-186).

Mr. Bosley's trial began on September 25, 1967, before the Honorable Aubrey E. Robinson, Jr. and a jury. Mr. Bosley and Miss Nolte each testified that they had been introduced the week before the incident complained of, on March 10, 1966, in the apartment directly above Miss Nolte's apartment, in a six-apartment converted

town house at 2816 Connecticut Avenue, N.W., and that Miss Nolte knew Mr. Bosley was living in that apartment (Tr. 9-10, 99-100). They each testified also that Mr. Bosley had been in Miss Nolte's apartment in the early hours of March 18, 1966, and while there had engaged in sexual intercourse with her. In other respects, their accounts differed radically.

Miss Nolte testified that she was asleep in her bed the night of March 17-18 and, sometime after midnight, awakened to find Mr. Bosley leaning over her bed (Tr. 8-9); that she screamed once but did not scream again because he struck her and threatened to kill her if she continued to scream (Tr. 9); that he remained in her apartment for a period of time, perhaps two hours (Tr. 32), during which he engaged in acts of sexual intercourse with her against her will at least three times, both with and without his clothes on, and also struck her and forced her to participate in two acts of oral sodomy (Tr. 10-15); that she tried to talk him out of it and tried to bribe him to leave by offering him time to get away (Tr. 10, 13, 28-29); that she offered no physical resistance except to cross her legs because she was "used to people who listen to reason, and who will accept no as an answer," and because he had threatened to kill her (Tr. 10-11); that she kissed him voluntarily once to try to get him to leave (Tr. 14); that he went to another

room once leaving her alone in the bedroom, where there was a telephone (Tr. 95), but she was too exhausted to move (Tr. 15); and that he finally dressed and left through a living room window, after explaining that he had left his keys in his own apartment (Tr. 30), and went up a fire escape which connected her apartment to his on the outside of the building (Tr. 15-16). On cross examination by defense counsel, Miss Nolte testified further that she scratched Mr. Bosley on his back once (Tr. 97) and that at one point while Mr. Bosley was with her she tried to go to sleep (Tr. 97).

Mr. Bosley testified that, after their first meeting on March 10, 1966, he had talked to Miss Nolte a second time on March 15 or 16, 1966, outside their apartment building and that on that occasion she had invited him to her apartment but he had refused because of prior commitments (Tr. 102, 131-132); that on March 17, 1966, which was his birthday, he had spent the evening celebrating at a neighborhood bar and had returned to his apartment between 1:45 and 2 a.m. on March 18 (Tr. 101-102); that he felt lonely at that point, went down the inside steps, and knocked on the door of Miss Nolte's apartment (Tr. 102-103, 139-140); that she opened the door and admitted him (Tr. 103-104); that, after approximately 30 to 45 minutes (Tr. 146) of conversation in the living room, he made advances which

she accepted and they went to bed together in her bedroom (Tr. 104-105); that they had intercourse with her consent, and only once, immediately after which he fell asleep (Tr. 105, 151, 157); that he never struck her or threatened her or subjected her to any acts of sodomy (Tr. 156-157, 160); that she awakened him at approximately 6 a.m., at which point he was feeling bad with a hangover from his celebration the night before and she was upset about whether she might be pregnant and whether her fiance might learn of the episode (Tr. 105-107, 168-169); that he felt too bad with his hangover to show her any sympathy and returned to his apartment, leaving by way of her living room window and the fire escape because he found he had left his keys upstairs (Tr. 107-108, 169).

On cross examination by Government counsel, Mr. Bosley testified further that, before going to Miss Nolte's apartment that night, he had drunk about a dozen bottles of beer and two mixed drinks at the neighborhood bar (Tr. 135-136), and that, before his one act of intercourse with Miss Nolte, he had removed his clothes (Tr. 150) and had not put them on again until after 6 a.m. (Tr. 152-153).

Mr. Bosley also testified that, after returning to his apartment from Miss Nolte's apartment, he had gone out to a neighborhood grocery store for some food,

returned to his apartment, and gone to sleep on the couch where the police later found him (Tr. 108). Meanwhile, Miss Nolte, according to her testimony, had called a lady friend on the telephone (Tr. 16), gotten dressed, "looked around the apartment for evidence of the defendant's presence" (Tr. 199), taken a taxi cab to the friend's house, and called the police from there (Tr. 16).

Mr. Paul M. Stombaugh, an agent of the Federal Bureau of Investigation, testified at the trial on behalf of the Government as an expert in the examination of hairs and fibers. He testified that he had conducted a "hair and fiber examination" on the articles of clothing and hair sample that had been taken from Mr. Bosley and on certain articles and hair samples given to the police by Miss Nolte (Tr. 70-73).

With respect to the hair examination, Mr. Stombaugh testified that he found on Mr. Bosley's trousers and sweater pubic hairs that microscopically matched a pubic hair sample reported to him to be from Miss Nolte (Tr. 74); that he found on Miss Nolte's bedsheet and nightgown pubic hairs that microscopically matched a pubic hair sample reported to him to have been taken from Mr. Bosley (Tr. 74-75); that he found on Mr. Bosley's shirt, trousers, undershorts, gloves and handkerchief and on Miss Nolte's bedsheet, nightgown and panties numerous short head hair clippings, all of which

he concluded could have originated from one person, but that he did not have a head hair sample from Mr. Bosley to compare the clippings with (Tr. 75); that he found on Mr. Bosley's trousers and on Miss Nolte's bedsheet and nightgown several long head hairs "that had been forcibly pulled out by the roots", which were identical in all individual microscopic characteristics with a known head hair sample from Miss Nolte (Tr. 75); and that he found on Mr. Bosley's sweater several head hair fragments that also matched the head hairs of Miss Nolte (Tr. 76).

With respect to the fiber examination, Mr. Stombaugh testified that he found on Mr. Bosley's handkerchief and on Miss Nolte's bedsheet and nightgown fibers which he concluded could have come from Mr. Bosley's trousers (Tr. 76-77); that he found on Mr. Bosley's handkerchief and on Miss Nolte's sheet, nightgown and panties fibers that microscopically matched the fibers composing Mr. Bosley's sweater (Tr. 77); and that he found on Mr. Bosley's trousers and sweater fibers which microscopically matched, and therefore could have come from, Miss Nolte's bedsheet (Tr. 78).

There was also admitted into evidence at the trial a stipulation to the effect that Mr. Cornealius McWright, an agent of the Federal Bureau of Investigation, was an expert in "body stains" and that, if he were called as a witness, he would testify that he had

examined the clothing and bedsheet given to the police by Miss Nolte and the clothing taken from Mr. Bosley and that the only stain he had found on any of those items was a semen stain on Mr. Bosley's shorts (Tr. 84).

In the course of cross-examining Mr. Bosley about events on the morning of March 18, 1966, after his return to his apartment from the grocery store and before his arrest, Government counsel engaged Mr. Bosley in the following series of questions and answers (Tr. 173):

"Q. Had you done any reading in the apartment after you returned from the store?

"A. Any reading?

"Q. Yes. Did you read?

"A. No, sir, not then.

"Q. Did you have any reading material in that apartment, Apartment 6?

"A. Yes, I think there was some books there.

"Q. What kind?

"A. Paper novels.

"Q. Any obscene books in there at all, in that apartment?

"A. How do you mean obscene, sir?

"Q. Pornographic literature.

"A. No, sir, I bought them in a news stand.

"Q. Beg pardon?

"A. I bought them downtown at the news stand.

"Q. All right."

After three and one-half transcript pages of questions and answers on other subjects, Government counsel asked Mr. Bosley (Tr. 177):

"Q. And at the time that they came there and you were on the couch, you say there was no pornographic literature near you; is that what you are saying?

"A. Pornographic literature?

"Q. Yes, sir.

"A. There was some novels, I think was on the couch, that I had read the previous day, or had been reading."

There was no other evidence or effort to elicit evidence concerning "obscene books" or "pornographic literature" at any time during the trial.

Shortly afterward, and still during Government counsel's cross examination of Mr. Bosley, Government counsel was granted permission to approach the bench, where the following colloquy ensued (Tr. 180-181):

"MR. CAPUTY: At the time of this arrest in the premises he was advised of his rights, and at that time he, according to the police,

said that he was not in that apartment at all and denied being in the apartment. I would like to inquire about that. I am not going into any question of guilt of housebreaking. I think this is a peripheral matter. He says he was not in the apartment. I am not going into the housebreaking, I am not going into the rape or anything else, but he said that to the police, and I have the officer Boyle, or whatever his name was, that can testify to that effect, that he said he was not in that apartment. And on the stand now he says he was there, but he says he was there with consent. To the police at the time of his arrest he said he was not in the apartment. I am not going into any question of guilt, if Your Honor please.

"THE COURT: I understand.

I will hear from you, Mrs. Dwyer.

"MRS. DWYER: Your Honor, I would, of course, object to that.

"THE COURT: On what grounds?

"MRS. DWYER: On the ground that he had obviously had no counsel at that time. He had not been arraigned.

"MR. CAPUTY: He was advised of his rights. I am not going into the question of guilt, if Your Honor please. This is a statement made, it's not an admission, but it's on a peripheral matter.

"THE COURT: I think it has bearing, and it is admissible. It doesn't go to whether or not there was a housebreaking or rape. It is really a question of whether or not he said he had ever been there before.

"I will admit the testimony."

After having Mr. Bosley identify Detective William J. Boyle, present in the courtroom, as one of the officers who had arrested him, Government counsel then asked Mr. Bosley (Tr. 183):

"Q. On March 18, 1966, at 2816 Connecticut Avenue, Northwest, in Room 6, where you were living, did you not tell this officer that you were not in the apartment downstairs, that you left the tavern around 2:00 o'clock and came home and went to bed; did you tell him that?"

Mr. Bosley denied that he had made such a statement (Tr. 183-184).

Detective Boyle was recalled as a rebuttal witness for the Government and testified that Mr. Bosley had made such a statement to him at the time Mr. Bosley

was placed under arrest (Tr. 207-208). The jury was not instructed, either at the time of this testimony or in the charge, that this testimony was to be considered only for some limited purpose.

Government counsel then inquired into the events immediately preceding the arrest as follows (Tr. 208-209):

> "Q. At the time that the defendant was placed under arrest, how did you get into his apartment?
>
> "A. We knocked on the door. The door was a little bit ajar. We knocked on the door. No answer. We could look through and see someone laying on the couch. So we just pushed the door open and walked in."

This account was consistent with the testimony Mr. Bosley had given that he had not admitted the officers and did not know of their presence until they were shaking him on the couch (Tr. 176-177).

When both the Government and the defense had rested, defense counsel renewed all motions and objections for the record, to which the Court replied, "All motions are overruled. The rulings stand the same" (Tr. 212).

STATEMENT OF POINTS

I. The Trial Court Erred in Allowing Detective Boyle to Testify, Over Appellant's Objection, to the Statement Allegedly Made by Appellant While in Police Custody.

With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: pp. 49-51, 66, 108, 166-167, 176-177, 180-185, 207-209, 223, 246-247.

II. The Trial Court Erred in Admitting Evidence Concerning the Statement Allegedly Made by Appellant to Detective Boyle, Concerning the Hair and Fiber Examinations, and Concerning the Seminal Stain Examination, All of Which Were Fruits of an Arrest Illegal Under the Criteria of 18 U.S.C. § 3109.

With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: pp. 49-52, 58-66, 70-79, 84, 108, 152-155, 166-167, 176-177, 180-186, 207-209, 219-221, 223, 246-247.

III. Questions by Government Counsel Concerning "Obscene Books" and "Pornographic Literature" Deprived Appellant of a Fair Trial.

With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: pp. 173, 177.

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING DETECTIVE BOYLE TO TESTIFY, OVER APPELLANT'S OBJECTION, TO THE STATEMENT ALLEGEDLY MADE BY APPELLANT WHILE IN POLICE CUSTODY

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that:

> "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444.

That decision imposed a specific duty on police officers to warn an accused "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 436, 444.

The Supreme Court went on to state that if, notwithstanding such warnings, a statement is elicited from an accused without the presence of counsel, "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege

against self-incrimination and his right to retained or appointed counsel." 384 U.S. 436, 475.

"Custodial interrogation" such as to require application of the Miranda rules need not take place in a police station. In Orozco v. Texas, ___ U.S. ___, 22 L. Ed. 2d 311, decided March 25, 1969, the defendant's conviction of murder without malice had been based in part on admissions obtained from the defendant by police, without the Miranda warnings, in the defendant's boarding house bedroom, to which the defendant had retired after leaving the scene of a shooting. The Supreme Court reversed the conviction, holding that the defendant "was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning" and that the situation was therefore within the language of the Miranda opinion declaring that the prescribed warnings are required when the person being interrogated is "'in custody at the station or otherwise deprived of his freedom of action in any way.' 384 U.S. 436, 477, ..." 22 L. Ed. 2d 311, 315.

Under the Miranda decision itself, the required warnings and waiver are "prerequisites to the admissibility of any statement made by a defendant." 384 U.S. 436, 476.

> "[N]o distinction may be drawn between inculpatory statements and statements

alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." 384 U.S. 436, 477.

In the instant case, Detective Boyle was allowed to testify that the appellant had told him in the appellant's apartment at the time of his arrest "that he was not in the apartment of the complaining witness, that he had been to a tavern until 2:00 o'clock and came back home and went to bed" (Tr. 208). This testimony was highly prejudicial to the consent defense on which appellant principally relied at trial.

The evidence concerning the circumstances of appellant's arrest compels the inference that the officers went to appellant's apartment for the sole purpose of

arresting him and that, at least from the moment they shook him awake, he was under arrest and not free to leave (Tr. 49-51, 66, 176-177, 208-209).

Nevertheless, the Government introduced no evidence to show that the appellant had been advised of his rights* and made no effort whatsoever to meet its "heavy burden" to demonstrate a knowing and intelligent waiver of his rights by the appellant.

The Miranda issue was brought to the Court's attention by defense counsel's objection "on the ground that he had obviously had no counsel at that time" (Tr. 181). It appears from Government counsel's argument to the Court on the point and from the Court's ruling (Tr. 180-181) that they both may have assumed that even an acknowledged Miranda violation did not require the exclusion of a statement offered for impeachment purposes. That would be an incorrect basis for admission of Detective Boyle's testimony regarding the statement alleged to have been made by the appellant in this case for at least two reasons.

First, that position is inconsistent with the treatment in the Miranda opinion of statements used to impeach the defendant's testimony at trial, 384 U.S. 436, 477, quoted above, and was specifically rejected by this

* Government counsel twice told the Court at the bench that the appellant had been so advised (Tr. 180-181), but said nothing about the question of waiver.

Court, in circumstances very similar to the instant case, in Blair v. United States, ___ U.S. App. D.C. ___, 401 F.2d 387 (1968).

Second, the discussion at the bench preceding its admission notwithstanding, the use of the testimony was not restricted to impeachment of the appellant's credibility. No instruction was given the jury to so restrict their consideration of the alleged statement,* and Government counsel treated it in his closing rebuttal argument (Tr. 246-247) as follows:

> "When was it, members of the jury, that he comes up with this consent business, as he testified to? You have the testimony of the police officer, and I remind you again, a disinterested witness, and that police officer said at the time that this individual was arrested the first thing he said, not that I had relations with her with her consent, the first thing that he said, members of the jury, and he is a disinterested witness, is that I was drunk in that apartment, that I had been to a beer place or night club until 2:00 o'clock, I went home and went to sleep."

* Cf. Jones (Aaron) v. United States, 128 U.S. App. D.C. 36, 385 F.2d 296 (1967).

II. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE CONCERNING THE STATEMENT ALLEGEDLY MADE BY APPELLANT TO DETECTIVE BOYLE, CONCERNING THE HAIR AND FIBER EXAMINATIONS, AND CONCERNING THE SEMINAL STAIN EXAMINATION, ALL OF WHICH WERE FRUITS OF AN ARREST ILLEGAL UNDER THE CRITERIA OF 18 U.S.C. § 3109

The Supreme Court held in Miller v. United States, 357 U.S. 301 (1958), that an arrest is unlawful, and that evidence obtained as a result of the arrest is therefore inadmissible, when police officers "break" the door of an apartment to execute an arrest without warrant without first giving notice of their authority and purpose and being refused admittance, in accordance with the criteria of 18 U.S.C. § 3109.* The notice must be "in the form of an express announcement by the officers of their purpose for demanding admission." 357 U.S. 301, 309.

In the Miller case, the petitioner had opened the door on an attached door chain and then attempted to close the door. The officers had put their hands inside the door and pulled and ripped the chain off and entered, without having expressly demanded admission or stated

* "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." 18 U.S.C. § 3109.

Prior to Miller, this Court had developed a similar rule in Accarino v. United States, 85 U.S. App. D.C. 394, 179 F.2d 456 (1949).

their purpose for their presence. 357 U.S. 301, 303-304. The Supreme Court reversed the subsequent conviction because certain marked currency found by the officers in an ensuing search was admitted at trial.

In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court held that, because an entry by narcotics agents was unlawful for failure to meet the criteria of 18 U.S.C. § 3109, a bedroom arrest which followed was unlawful and certain declarations made to the agents by one of the petitioners in his bedroom should have been excluded as "fruits" of the agents' unlawful action.

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. ... [V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." 371 U.S. 471, 485.

The Supreme Court also held in Wong Sun that, "when circumstances are shown such as those which induced these declarations," it is immaterial, for purposes of

determining inadmissibility, whether the declarations be termed "exculpatory." 371 U.S. 471, 487.

Then, in Sabbath v. United States, 391 U.S. 585 (1968), the Supreme Court held that, because federal officers opened the closed but unlocked door of the petitioner's apartment and entered in order to arrest him without first announcing their identity and purpose, the ensuing arrest was invalid and evidence seized in a subsequent search should not have been admitted at trial. After quoting from the Miller decision to the effect that "the requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application" (357 U.S. 301, 313), the Court went on to say:

> "Considering the purposes of § 3109, it would indeed be a 'grudging application' to hold, as the Government urges, that the use of 'force' is an indispensable element of the statute. To be sure, the statute uses the phrase 'break open' and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law. ... An unannounced intrusion into a dwelling--what § 3109 basically proscribes--is no less

> an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door." 391 U.S. 585, 589-590.

In the instant case, the officers found the door "a little bit ajar" (Tr. 208). They knocked on the door and received no answer, but "could look through and see someone laying on the couch" (Tr. 208-209). So they "just pushed the door open and walked in" (Tr. 209). Such an entry is clearly within the rationale of the Miller and Sabbath decisions. The Miller entry began with the door partly open, and Sabbath holds that force is not necessary for application of the rule. Only a most "grudging application" of the requirement for prior notice of authority and purpose would allow a distinction based on whether a door is entirely closed or "a little bit ajar" before police officers push it open and make unannounced entry into an apartment dwelling. The entry in this case was no less "an unannounced intrusion into a dwelling--what § 3109 basically proscribes", Sabbath v. United States, supra, 391 U.S. 585, 590, because the door was a little bit ajar when the officers arrived.

The same result is indicated by the opinion of this Court in Keiningham v. United States, 109 U.S.

App. D.C. 272, 287 F.2d 126 (1960) quoted by the Supreme Court in Sabbath.

> "We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) is governed by something more than the fortuitous circumstance of an unlocked door, and that the word 'break', as used in 18 U.S.C. § 3109, means 'enter without permission.' We think that a 'peaceful' entry which does not violate the provisions of § 3109 must be a permissive one, and not merely one which does not result in a breaking of parts of the house." Keiningham v. United States, 109 U.S. App. D.C. 272, 276, 287 F.2d 126, 130 (1960).

If the entry of the detectives and the arrest of appellant were unlawful because the detectives failed to comply with the criteria of 18 U.S.C. § 3109, the statement the appellant allegedly made to Detective Boyle at the time of his arrest and the results of the analyses of appellant's clothing and hairs, taken from him after his arrest, were all the fruits of the illegal arrest, Wong Sun v. United States, 371 U.S. 471 (1963), and the failure to exclude them from appellant's trial was error which requires reversal.

The testimony of Detective Boyle concerning the statement allegedly made to him by appellant at the time of his arrest was objected to at trial, although not specifically on the ground that it was the fruit of an illegal entry and arrest. The results of the hair and fiber examinations were admitted without objection at trial, and the results of the "body fluids" examination was the subject of a stipulation. Appellant should nevertheless be allowed to challenge their admission, on the ground now asserted, on appeal. The circumstances of the entry into appellant's apartment were fully described during Government counsel's questioning of Detective Boyle (Tr. 208-209), so that there is no deficiency in the record. Cf. Sabbath v. United States, 391 U.S. 585, 588 n. 1.

Furthermore, the admission of the evidence in question involved "plain error" and "defects affecting substantial rights" as contemplated by Rule 52(b), Fed. R. Crim. P.* It seems clear that a conviction based on evidence obtained as the fruits of an illegal entry and arrest is a defect affecting substantial rights. Cf. Miller v. United States, 357 U.S. 301, 313 (1958); Townsley v. United States, 215 A.2d 482, 483 (D.C. Ct.

* "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Rule 52(b), Fed. R. Crim. P.

App. 1965). That fact, together with the clarity of the record on the circumstances of the illegal entry, makes this an appropriate case for the application of the "plain error" rule. See Smith v. United States, 118 U.S. App. D.C. 235, 239 n. 13, 335 F.2d 270, 274 n. 13 (1964); Contee v. United States, 94 U.S. App. D.C. 297, 215 F.2d 324 (1954). See also Gregory v. United States, 125 U.S. App. D.C. 140, 142 n. 5, 369 F.2d 185, 187 n. 5 (1966).

III. QUESTIONS BY GOVERNMENT COUNSEL CONCERNING "OBSCENE BOOKS" AND "PORNOGRAPHIC LITERATURE" DEPRIVED APPELLANT OF A FAIR TRIAL

No factual basis appears anywhere in the trial record for the several questions put to appellant by Government counsel concerning the presence of "obscene books" and "pornographic literature" in his apartment (Tr. 173, 177). Nor does any basis appear for asserting the relevancy in a legal sense of those questions. What is apparent from the nature of the charges against appellant and the conflicting testimony of appellant and the complaining witness is that the questions had a very great potential for prejudice and should not have been asked or allowed. The fact that defense counsel may have concluded for some tactical consideration that she should not lodge an objection, or otherwise failed

to object, does not justify Government counsel's raising and pursuing the line of questioning or the Trial Court's allowing him to do so.

In Berger v. United States, 295 U.S. 78, 88 (1935), the Supreme Court recognized that the average jury is likely to have special confidence in the prosecuting attorney as the representative of the Government and that, consequently, improper suggestions or insinuations are apt to carry much weight against the accused when they should properly carry none. See also Reichert v. United States, 123 U.S. App. D.C. 294, 297-8 359 F.2d 278, 281-2 (1966); Jackson v. United States, 111 U.S. App. D.C. 353, 356, 297 F.2d 195, 198 (1961) (concurring opinion of Judge Burger); Stewart v. United States, 101 U.S. App. D.C. 51, 55-6, 247 F.2d 42, 46-7 (1957) (en banc) (opinion of Judge Bazelon); Lee Won Sing v. United States, 94 U.S. App. D.C. 310, 215 F.2d 680 (1954) (per curiam).

This Court has stated that, "even in the zeal of prosecution of an important capital case, Government counsel must exercise thoughtful restraint in framing his questions, having in mind possibly prejudicial error." Watson v. United States, 98 U.S. App. D.C. 221, 224, 234 F.2d 42, 45 (1956). And, "on a nerve-center issue we are more likely to hold the prosecutor to account. ...

The prejudice digs in and holds on." King v. United States, 125 U.S. App. D.C. 318, 330, 372 F.2d 383, 395 (1967).

The suggestion that appellant had been reading "obscene books" or "pornographic literature" came very close to the heart of the decision the jury had to make in choosing whether or not to believe appellant's denials that he was guilty of the sex crimes for which he was on trial.

CONCLUSION

For the reasons stated above, counsel for appellant submit that the judgment below should be reversed, and the case remanded for a new trial on all counts.

Respectfully submitted,

Murdaugh Stuart Madden
R. Timothy Hanlon
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Both Appointed by this Court)

May 8, 1969

301

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,513

DAVID E. BOSLEY,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a Judgment of the United States
District Court for the District of Columbia

MURDAUGH STUART MADDEN
R. TIMOTHY HANLON
910 17th Street, N.W.
Washington, D.C.

Counsel for Appellant
(Both Appointed by this Court)

July 10, 1969

TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Cases chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,513

DAVID E. BOSLEY,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

REPLY BRIEF FOR APPELLANT

ARGUMENT

THE ADMISSION OF TESTIMONY CONCERNING A STATEMENT ASSERTEDLY MADE BY APPELLANT WHILE IN POLICE CUSTODY WAS NOT "HARMLESS ERROR"

The Government's brief apparently concedes, albeit reluctantly, a violation of the exclusionary rule of Miranda v. Arizona, 384 U.S. 436 (1966) in the admission at appellant's trial of testimony that appellant had told a police officer at the time of his arrest

"that he was not in the apartment of the complaining witness, that he had been to a tavern until 2:00 o'clock and came back home and went to bed." The Government argues, however, that the error should be held to have been "harmless" under the standard of Chapman v. California, 386 U.S. 18 (1967).

It should be recognized at the outset that it is not at all clear that the Chapman "harmless-error" test has any application to a Miranda error. The Supreme Court specifically recognized in its Chapman opinion that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. 18, 23. The Supreme Court cited three cases to illustrate that point, two of which were Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession) and Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel). Counsel for appellant are aware of no case that has yet decided whether a violation of the Miranda rule is in that category so as to always require reversal, but it is apparent that Miranda was based on the same constitutional privilege against self-incrimination and right to assistance of counsel that support the Payne and Gideon decisions and therefore is closely allied to those cases. Compare White v. Maryland, 373 U.S. 59 (1963).

Appellant suggests, however, that it should not be necessary for the Court to decide that question in this case because, even if the Chapman test were applicable, the Government certainly has not "met its burden of proving beyond a reasonable doubt that the erroneous [evidence] did not contribute to [appellant's] conviction." Fontaine v. California, 390 U.S. 593, 596 (1968); Chapman v. California, 386 U.S. 18, 24 (1967).

This was a close case at trial, turning essentially on which detailed version of the facts--that of the appellant or that of the complaining witness--the jurors believed. The extrinsic corroboration of the alleged events was minimal; appellant's story contained a likely motivation for the girl's complaint to police, and his conduct after leaving her apartment was hardly consistent with guilt of the ugly crimes alleged. The closeness of the case is indicated by the entire record and may also be indicated by the fact that the jury convicted the appellant, not of rape as charged, but of the lesser included offense of assault with intent to commit rape--despite the testimony of both participants to a completed act of intercourse.

Testimony that appellant had told a different story at the time of his arrest, completely inconsistent with the consent defense on which he principally relied at trial, must have been highly prejudicial to appellant.

That the Government thought so at trial is apparent from its introduction of the testimony and from Government counsel's reliance on the testimony in his argument to the jury (Tr. 246-247). No reason appears why this evidence was any less prejudicial to appellant than the statements involved in Proctor v. United States, _____ U.S. App. D.C. _____, 404 F.2d 819 (1968) and Blair and Suggs v. United States, _____ U.S. App. D.C. _____, 401 F.2d 387 (1968).

Respectfully submitted,

Murdaugh Stuart Madden
R. Timothy Hanlon
910 17th Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Both Appointed by this Court)

July 10, 1969

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,513

DAVID E. BOSLEY,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from a Judgment of the United States
District Court for the District of Columbia

MURDAUGH STUART MADDEN
R. TIMOTHY HANLON
910 17th Street, N.W.
Washington, D.C.

Counsel for Appellant
(Both Appointed by this Court)

April 23, 1970

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,513

DAVID E. BOSLEY,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Appellant David E. Bosley petitions the Court for a rehearing by the three-judge panel which heard this case and, if such a rehearing is not granted, suggests a rehearing by the Court en banc.

1. The holding of the Court in Part I of its opinion of April 9, 1970, is that a spontaneous denial of guilt volunteered by a suspect in response to a police announcement of the charges leveled against him before the police have had an opportunity to warn him

of his rights[1] need not be excluded under the rule of Miranda v. Arizona, 384 U.S. 436 (1966).

2. The Court's application of that principle to allow use by the Government of the contested statement in this case rests on the Court's factual finding that the police had no opportunity to give the Miranda warnings or to prevent the statement from being made (Slip Opinion, p. 8).

3. That finding is inconsistent with the trial record and presents a crucial point of fact which the Court has "overlooked or misapprehended" Fed. R. App. P. 40. There was no testimony that the contested statement was made by appellant before the police had an opportunity to warn him of his rights. On the contrary, the Government twice advised the trial court that the defendant had been "advised of his rights" prior to making the statement in question (Tr. 180, 181).

4. Considering the entire colloquy at the bench before the trial court's decision to admit the

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1/ In announcing this holding the Court said:

> We believe that Miranda does require the police to warn an arrested suspect of his rights as immediately as practicable after arresting him. A heavy burden rests on the government to prove any contention that the arrested suspect volunteered a statement without any "interrogation," explicit or implicit, on the part of the police and before he could be warned of his rights. (Slip Opinion, p. 8, emphasis added).

contested testimony[2] and the fact that the arrest in this case occurred prior to the Supreme Court's Miranda decision, although the trial occurred after the Miranda decision, the inference is inescapable that the Government understood from its police officers that appellant had

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2/ MR. CAPUTY: At the time of this arrest in the premises he was advised of his rights, and at that time he, according to the police, said that he was not in that apartment at all and denied being in the apartment. I would like to inquire about that. I am not going into any question of guilt of housebreaking. I think this is a peripheral matter. He says he was not in the apartment. I am not going into the housebreaking, I am not going into the rape or anything else, but he said that to the police, and I have the officer Boyle, or whatever his name was, that can testify to that effect, that he said he was not in that apartment. And on the stand now he says he was there, but he says he was there with consent. To the police at the time of his arrest he said he was not in the apartment. I am not going into any question of guilt, if Your Honor please.

THE COURT: I understand.

I will hear from you, Mrs. Dwyer.

MRS. DWYER: Your Honor, I would, of course, object to that.

THE COURT: On what grounds?

MRS. DWYER: On the ground that he had obviously had no counsel at that time. He had not been arraigned.

MR. CAPUTY: He was advised of his rights. I am not going into the question of guilt, if Your Honor please. This is a statement made, it's not an admission, but it's on a peripheral matter.

THE COURT: I think it has bearing, and it is admissible. It doesn't go to whether or not there was a housebreaking or rape. It is really a question of whether or not he had ever been there before.

I will admit the testimony.

received some warning, but one that did not meet the Miranda standards.[3] The Government therefore attempted to introduce evidence of the statement only for impeachment, on the mistaken[4] notion that statements obtained without full Miranda warnings could nevertheless be introduced for impeachment purposes, and the trial court admitted the testimony on that basis.

5. This Court is severely handicapped in its consideration of the Miranda point by the lack of an adequate record on the circumstances surrounding the arrest. The relevant facts were not fully developed in the trial court because the Government incorrectly asserted and the trial court erroneously agreed that the statement could be admitted for impeachment purposes without regard to the Miranda rule. Since, under that ruling, nothing turned on whether the statement was a product of custodial interrogation, no inquiry was made to establish the precise details of the arrest and of the conversation between the police officers and appellant following the arrest.

6. Appellant therefore urges that the proper disposition of this case on rehearing is to remand to the trial court for an evidentiary hearing after which

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3/ Compare United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Groshart v. United States, 392 F.2d 172 (5th Cir. 1968).

4/ Slip Opinion, p. 6 and cases cited there.

it could be determined on an adequate record, viewed in light of the legal principles enunciated in the opinion of April 9, 1970, whether the statement in question resulted from custodial interrogation and in all other respects fell within the purview of the Miranda rule or not.5/

7. If appellant is not granted a rehearing by the three-judge panel which heard this case, he suggests the appropriateness of a rehearing by the Court en banc. Appellant would argue to the Court en banc that this Court should not hold a contested statement to be outside the purview of the Miranda rule, without

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5/ The thrust of the Government's argument in its brief in this case was that, even if the admission into evidence of the contested statement did violate the Miranda rule, the error was harmless beyond a reasonable doubt. This was a position which, like the Government's position at trial, essentially avoided the question whether there had been a Miranda violation or not. The Government's brief suggested that, if the harmless error theory were not accepted by the Court, as it was not, the Court should consider a remand to the District Court for amplification of the record:

> Alternately, if there is need for amplification of the record, appellee suggests a remand to the District Court for a determination of whether appellant was in custody at the time of the statement, and whether the statement was a volunteered impulsive denial not a product of police interrogation, and lastly the extent to which appellant may have been advised of and possibly waived his rights.
> Brief for Appellee, p. 11, n. 3; see also Brief for Appellee, p. 15.

further inquiry, in a case in which the precise circumstances of the arrest were never established in the trial court because the trial court's view of the law, since held by this Court in this case and others to be erroneous, made inquiry into those circumstances irrelevant. This is a procedural question of exceptional importance, Fed. R. App. P. 35(a). If the law as enunciated by this Court makes factual matters relevant which, through no fault of appellant, were not established by the trial court, this Court should remand for a hearing to establish those facts. In this case, appropriate proceedings in the trial court should now establish what opportunity the police had to warn appellant of his rights, what warnings were in fact given him, what waivers, if any, occurred, and all other factual matters, not previously established, which are relevant to an application to appellant of the legal principles enunciated in the opinion of April 9, 1970.

CONCLUSION

By reason of the foregoing, appellant respectfully submits that his petition for a rehearing or, in

the alternative, his suggestion for a rehearing en banc should be granted.

Dated: April 23, 1970

Respectfully submitted,

Murdaugh Stuart Madden
R. Timothy Hanlon
910 17th Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Both Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc were delivered to the United States Attorney for the District of Columbia this 23rd day of April, 1970.

R. Timothy Hanlon